

BEFORE THE
COUNCIL OF THE CITY OF NEW ORLEANS

***IN RE: APPLICATION OF ENTERGY
NEW ORLEANS, INC. FOR
APPROVAL TO CONSTRUCT NEW
ORLEANS POWER STATION AND
REQUEST FOR COST RECOVERY
AND TIMELY RELIEF***

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DOCKET NO. UD-16-02

MEMORANDUM AND ORDER

On October 16, 2017, Deep South Center For Environmental Justice, Alliance For Affordable Energy, 350 Louisiana New Orleans, and Sierra Club (“Intervenors”) jointly filed, *inter alia*, Pre-Filed Supplemental Testimony of Dr. Beverly Wright, PhD (“Supplemental Testimony”). On November 16, 2017, the Advisors filed a motion to strike (“Motion”) portions of said testimony, along with a Memorandum in Support of the Motion (“Memorandum”). In accordance with the Hearing Officer’s scheduling order, on November 22, 2017, Intervenors distributed, via electronic mail, their opposition to said motion¹ (“Opposition”).

DISCUSSION

Advisors seek to strike portions of the Supplemental Testimony as follow:

Section IV of the Table of Contents;

Page 3, lines 5 - 9 and 17 - 25;

Page 4, lines 1 - 28;

Page 5, lines 1 - 22; and

¹ Intervenors state they will actually *file* the Opposition when the Clerk’s Office reopens after the Thanksgiving holiday. Email from Monica Harden of November 22, 2017.

Page 6, lines 1 - 19.

Motion at 1.

The testimony, which Advisors seek to strike, consists of Dr. Wright's perceptions of various matters centered upon alleged due process problems associated with the instant docket. *See Supplemental Testimony*, pp. 3 - 6.

In support of its motion to strike the above-stated portions, Advisors advance two arguments: (1) the offending testimony consists of legal conclusions and opinions that Dr. Wright is not qualified to reach or render; and (2) the conclusions and opinions are not supported by sufficient facts, arguing essentially that the factual foundations of Dr. Wright's perceptions are simply wrong. *See generally* Memorandum.

Addressing these arguments in reverse order, the Hearing Officer notes, as correctly stated by Advisors, to be admissible, the opinions of any expert witness must, *inter alia*, be "based on sufficient facts or data." La. Code of Evidence Ann. Art 702(2), Acts 1988, No. 515, §1, eff. Jan. 1, 1989; Acts 2014, No. 630, §1. Advisors expend considerable effort explicating the erroneous factual foundations of Dr. Wright's conclusions.² The Hearing Officer agrees that some of these conclusions, along with the factual foundations from which they flow, are obviously erroneous. But, a rigorous examination of all the facts and conclusions recited by Dr. Wright and disputed by the Advisors, could only be conducted within the context of an evidentiary hearing, *i.e.*, a *Daubert*-style pre-trial hearing, *see e.g.*, 509 U.S. 579 (1993), or at the scheduled hearing on the merits.

² And Intervenors vehemently disagree with Advisors' characterizations. *See Opposition*, pp. 7 - 8.

Notwithstanding, the motion can be adequately disposed, and fully granted, based upon Advisors' first argument. All of the testimony *that Advisors seek to strike* is clearly outside the expertise of Dr. Wright.³

According to her original direct testimony, filed on January 6, 2017, Dr. Wright is the Founder and Executive Director of the Deep South Center for Environmental Justice in New Orleans, Louisiana, and she holds Doctorate of Philosophy and Master of Arts degrees in Sociology from the State University of New York at Buffalo, and a Bachelor of Arts degree in Sociology from Grambling State University in Louisiana. The primary focus of her research involves "racial disparities in environmental conditions," but also "entails advising governmental agencies on policies pertaining to meaningful and effective public participation, industrial facility siting, climate change mitigation and resiliency, equity in disaster recovery, and environmental justice research methodologies." Direct Testimony of Dr. Wright, pp. 1 - 2.

Dr. Wright's testimony *at issue*, to the extent it is to be deemed expert testimony at all (as contrasted with fact testimony or lay person opinion), consists of *legal* opinion. *See* Supplemental Testimony, pp. 3 - 6 (addressing the alleged undermining of fairness and due process). Legal opinion is generally *not* admissible *even through the testimony of lawyers*, because it rarely "assists the trier-of-fact to understand the evidence or to determine a fact in issue... [and is] proper for the purpose of assisting the court only in those fields where the court lacks sufficient knowledge to enable it to come to a proper conclusion without such assistance." *Morrison v. Johnson*, 571 So. 2d 788 at 791-2 (1990)(emphasis added). And of course, here, Dr. Wright is not even a lawyer.

³ Intervenors declare that Dr. Wright's expertise regarding the potential for disproportional impact by poor people and people of color is "reliable and helpful," Opposition at 9, but this non-legal portion of her testimony (Supplemental Testimony, a pp. 7 - 10) is not at issue in the instant Motion.

Her interpretations of FERC proceedings, legal settlements, Council resolutions, and Council proceedings, are all clearly beyond her professed expertise. Intervenors attempt to invoke the time-honored principle established in “Goose v. Gander,” by asserting that Dr. Wright merely attempts to “explain” matters such as Council resolutions, just as did Entergy in responses to discovery requests and in television broadcast interviews. Opposition, pps. 5 – 7. But, there is a vast difference between discovery responses, not being offered into evidence (and, of course, media interviews outside the litigation process), and evidentiary testimony proffered as expert opinion. Moreover, the gravamen of Dr. Wright’s disputed testimony is a due process argument – clearly a legal argument. If, as perhaps Intervenors are suggesting, Dr. Wright is merely commenting about the “fairness” of the legal process from a *non-legal* perspective, such testimony must be deemed the perspective of a lay person. One can imagine that an entire array of articulate and erudite individuals might share that perspective. But such opinions are appropriately expressed in public forums; not as expert testimony in legal proceedings. To reiterate for the sake of precision, that part of Dr. Wright’s testimony that does not address *the legal process* is not at issue here.

Accordingly, the motion is hereby **granted in full**, and,

It is hereby **ORDERED**, that the following portions of the Supplemental Testimony of Dr. Beverly Wright, PhD, is hereby **STRICKEN** from the record:

Section IV of the Table of Contents;

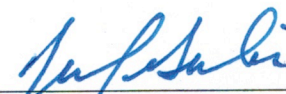
Page 3, lines 5 - 9 and 17 - 25;

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This 24th day of November, 2017.



JEFFREY S. GULIN
Hearing Officer